

AUG 24 2004

**CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS**

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CARLOS SOLORIO DIAZ,

Petitioner,

v.

JOHN ASHCROFT, Attorney General,

Respondent.

No. 03-70653

Agency No. A75-484-758

MEMORANDUM*

On Petition for Review of an Order of the
Board of Immigration Appeals

Submitted August 2, 2004**
Pasadena, California

Before: REINHARDT, NOONAN, and CLIFTON, Circuit Judges.

Petitioner Carlos Solorio-Diaz petitions for review of the denial by the
Board of Immigration Appeals (“BIA”) of his motion to reopen his application for

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

** This panel unanimously finds this case suitable for decision without oral argument. See Fed. R. App. P. 34(a)(2).

cancellation of removal based on new evidence. As the parties are familiar with the facts, procedural history, and arguments, we will not recount them here. We review the BIA's decision for the abuse of discretion. *Monjaraz-Munoz v. INS*, 327 F.3d 892, 895 (9th Cir. 2003). We grant the petition.

The BIA rejected Solorio-Diaz's motion because "he merely refer[red] the Board to [physical presence] evidence that the Immigration Judge correctly found lacking." This is incorrect. Although Solorio-Diaz did refer the BIA to his previously submitted evidence, he also attached as exhibits two *new* declarations regarding his physical presence in the United States and referred to those exhibits in his motion. Due to the obvious incompetence of his counsel, this evidence was previously unavailable. Its implication is that the affiants have known Diaz to be in residence since 1985. The BIA abused its discretion in failing to consider this evidence. *See Virk v. INS*, 295 F.3d 1055, 1061 (9th Cir. 2002); *Limsco v. INS*, 951 F.2d 210, 213 (9th Cir. 1991).

Furthermore, Solorio-Diaz's motion was not numerically barred. His prior motion to reopen was fraudulently filed by a notary and set forth legal issues and alleged facts wholly unrelated to his case. In such instances of fraud, the numerical limitation is waived. *See Varela v. INS*, 204 F.3d 1237, 1240 (9th Cir. 2000).

Notably, Solorio-Diaz received fraudulent or ineffective representation at every step of the process prior to this motion – in his hearing, on appeal, and in his first motion to reopen. During the initial hearing, the IJ commented repeatedly on counsel’s lack of preparation and failure to introduce witnesses or supporting evidence. No longer represented by a notary illegally practicing law or by counsel appearing on the notary’s behalf, Solorio-Diaz has now presented evidence, not previously available, that, although minimal, is sufficient to state a prima facie case for relief. *See* 8 C.F.R. § 1003.2(c)(1). The declarations of physical presence constitute new evidence because Solorio-Diaz’s counsel’s ineffectiveness prevented their introduction at the prior hearing. *Cf. Iturribarria v. INS*, 321 F.3d 889, 900-01 (9th Cir. 2003). Furthermore, as the BIA acknowledged, Solorio-Diaz has also submitted new evidence indicating that his removal would cause “exceptional and extremely unusual hardship” to his American son, who developed asthma and pulmonary disease only after the cancellation of removal hearing.

The new evidence of residency combined with the new evidence of exceptional and extremely unusual hardship reveals a “reasonable likelihood that the statutory requirements for relief have been satisfied.” *See Ordonez v. INS*, 345

F.3d 777, 785 (9th Cir. 2003). Therefore, we grant Solorio-Diaz's petition for review and remand to the BIA with instructions to grant his motion to reopen.

PETITION GRANTED; MATTER REMANDED.